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March 16, 2015

VIA ECF FILING

Hon. Frederic Block, U.S.D.J.
 United States District Court
 225 Cadman Plaza East
 Brooklyn, New York 11201

RE: Jose Calderon v. Zano Industries, Inc. and Fred Provenzano
Case No. 1:15-cv-00814 –FB-SMG

Dear Judge Block:

Our office has been retained to represent the Defendants Zano Industries, Inc. and Fred Provenzano ("Defendants") in the above-referenced matter. Defendants intend to file a Motion to Dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and request that Plaintiff's Complaint be dismissed in its entirety. In accordance with this Court's Local Rules, I am writing to request a pre-motion conference with the Court and opposing counsel to discuss this motion. The last day for Defendants to respond to Plaintiff's Complaint is March 19, 2015.

The basis for Defendants' motion is that Plaintiff's federal claim under the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. ("FLSA"), is time barred and should be dismissed with prejudice. Concomitantly, as there is otherwise no federal jurisdiction over this dispute, Plaintiff's state law claims should also be dismissed without prejudice.

By way of background, Plaintiff Jose Calderon ("Plaintiff") is alleged to have been employed by Defendants from May 2008 to June 2009.¹ Plaintiff contends that during his alleged employment, Defendants failed to pay him all wages to which he was legally entitled.²

The alleged basis for federal jurisdiction over the subject matter of this dispute is predicated solely upon the Defendants' alleged violation of the FLSA. To that end, Plaintiff alleges that jurisdiction is predicated upon 29 U.S.C. § 216(b), 28 U.S.C. § 1331 and 28 U.S.C. § 1337.³ Of the eight claims for relief alleged by Plaintiff, only the first claim for relief (Count 1) alleges an FLSA violation.⁴ The remaining seven (7)

¹ *Complaint* at ¶ 11 [Docket No. 1].

² *Id.* at ¶¶ 14-15.

³ *Id.* at ¶4. There can be no diversity jurisdiction because each of the parties are citizens of New York. *Complaint* at ¶¶ 8-10.

⁴ *Id.* at ¶¶ 17-28.

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claims allege either violation of New York statutes (Counts 2, 3 and 4) or New York common law (Counts 5-8).⁵ Plaintiff alleges supplemental jurisdiction for each of the state law claims.⁶

The statute of limitation for Plaintiff's FLSA claim is, at most, three (3) years;⁷ a fact Plaintiff admits in his Complaint.⁸ By his own admission, Plaintiff's alleged employment ended in June 2009. Under the FLSA, a claim accrues on the next regular payday following the work period when services are rendered. Plaintiff's FLSA claim therefore accrued, if at all, in June 2009, and was required to be brought by no later than June 2012. Plaintiff commenced this action on February 17, 2015. Accordingly, as clearly set forth on the face of his complaint, Plaintiff's FLSA claim was time-barred well prior to commencement of this action and should be dismissed.

Assuming that the federal claim is dismissed as time barred, the only remaining claims are Plaintiff's state law claims. This Court should elect not to hear those claims, which predominate Plaintiff's complaint, and dismiss them without prejudice for re-filing in state court, if at all.

Very truly yours,

LIPSITZ GREEN SCIME CAMBRIA^{LLP}

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⁵ *Id.* at ¶¶ 29-78.

⁶ *Id.* at ¶ 4.

⁷ 29 U.S.C. § 255(a).

⁸ *Complaint.* at ¶ 5.